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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS,
Petitioner.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

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No. 412

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THE STATE OF GEORGIA,
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I.

OPINIONS BELOW

The judgment of the Fulton Superior Court dismissing the petitioner's extraordinary motion for new trial is unreported, but is found in the Transcript of Record, page 16. The opinion of the Supreme Court of Georgia, affirming that judgment, is reported in 210 Ga. 665, 82 S.E. 2d 217, and found in the Transcript of Record, page 19, et seq. The opinion of the Supreme Court of Georgia affirming petitioner's conviction on appeal (prior to filing of the extraordinary motion for new trial) and which is not drawn in question here, is reported in 210 Ga. 207, 78 S.E. 2d 521.

II.

JURISDICTION

The jurisdiction of this Court is invoked by peti-

tioner under 28 U.S.C., Section 1257(3). Respondent respectfully denies the jurisdiction of this Court and contends that neither the Supreme Court of Georgia, nor the Superior Court of Fulton County, the trial court below, has at any stage of the proceeding decided a federal question as contended by petitioner.

III.

STATUTES INVOLVED

28 U.S.C., Section 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Although petitioner states in his brief, page 2, that the Georgia Code, Section 59-805, relating to the number of peremptory juror challenges allowed a defendant and the State, is involved, neither in the extraordinary motion for new trial, nor in his brief filed in this court, does petitioner attack this statute as being invalid.

IV.

STATEMENT

On March 10, 1953, petitioner was convicted in Fulton Superior Court of the offense of murder, and sen-

tenced to death. On appeal, the Supreme Court of Georgia affirmed the conviction as against several assignments of error, none of which are involved in this proceeding. See *Williams vs. State*, 210 Ga. 207, 78 S.E. 2d 521. The decision of the Supreme Court was rendered on October 14, 1953, and almost two months later, to wit, on December 1, 1953, petitioner filed in Fulton Superior Court an extraordinary motion for new trial, based on two grounds (R. 1). The second ground of this motion was abandoned (Opinion of the Supreme Court of Georgia, R. 20), and although the first ground (R. 1-6) is rather sweeping in its language, the issue has been narrowed down by the petition for certiorari to the proposition that the combination of two factual circumstances has operated to deny petitioner the equal protection of the laws, to wit: (1) The use by the Fulton jury commissioners of different colored slips of paper for the jury tickets of Negro and white jurors enabled the judge and other court officials drawing the names of prospective jurors from the jury box to deliberately discriminate against Negro jurors and thereby so limit the number of Negro jurors drawn for any panel to such a number as would (2) permit the Solicitor General to effectively prohibit, by the use of the peremptory challenges granted him by the statute,[1] any Negro from ever serving on a jury. (R. 4) Petitioner's motion reasoned that had members of his race been permitted to serve on the jury trying him, they might have given more regard to his statements denying implication in the crime, and in the event of conviction, might have voted to recommend mercy, in view of their understanding of "movant's heredity and environment, and of motivations among

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[1] Georgia Code, Section 59-805. In capital cases, the accused is entitled to twenty peremptory challenges, and the State to one-half the number granted the accused.

members of their race." (R. 5-6) [2]

Of the forty-eight jurors impaneled to try petitioner, four were Negroes, three of whom were excused for cause. The remaining Negro juror was challenged peremptorily by the State. (R. 5)

Upon hearing, the Court refused to consider the motion, and ordered its dismissal, the judgment declaring that the "grounds of the motion do not make out such a case as would authorize the court to hear and consider same as an extraordinary motion . . ." (R. 16) On appeal, the Supreme Court of Georgia affirmed the dismissal on two separate grounds, viz: (1) Petitioner waived any rights he may have had by failing to challenge the array of jurors put upon him, irrespective of whether or not he was aware, prior to the trial, of the practice of the Fulton jury commissioners in using different colored slips for white and colored jurors;[3] (2) The extraordinary motion for new trial was defective under Georgia practice for failure of the accompanying affidavits as to diligence of petitioner and his counsel to follow the form required by law. (R. 20-21)

Concluding, the Georgia Supreme Court declared,

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[2] Since nowhere in the motion or the petition does petitioner claim that the white jurors trying him were prejudiced against him in any way, the only reasonable construction of the above complaint is that petitioner believed that had colored jurors been permitted to serve, they would have been prejudiced in his favor, which of course is exactly what we believe the peremptory challenge was designed to prevent.

[3] The use of different colored jury slips by the Fulton Superior Court was declared illegal by this Court in *Avery vs. Georgia*, 345 U.S. 599, 97 L. Ed. 1244, 73 S. Ct. 891. The Avery case, which gained widespread notoriety from the moment of its transfer to Fulton County under a change of venue order, was tried in Fulton Superior Court on September 20, 1951, almost two years prior to the date of petitioner's trial on March 10, 1953. The allegations in the Avery case as to the alleged discrimination arising from use of the different colored jury slips, which were considered at this time by the court in passing upon the challenge to the array, were a popular topic of conversation in Fulton County. The decision of the Supreme Court of Georgia, detailing at length the undisputed facts as to the use of the jury slips, was rendered on April 14, 1952 (209 Ga. 116, 70 S.E. 2d 716), almost a year prior to petitioner's

> "Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials and other legal processes in this State and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction, and upon the denial of a new trial which is affirmed by this Court, be heard to say that the panel of jurors put upon him was not fairly and properly selected and impaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all."

It is highly pertinent to note that at no time prior to trial, during trial, or after trial on appeal, did petitioner raise or attempt to raise in any fashion, any objections to the jury impaneled to try him, nor any

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trial on March 10, 1953. The decision of the Georgia Supreme Court in the Avery case was widely publicized by the two Atlanta dailies, the *Atlanta Constitution*, having a circulation of 183,300, and the *Atlanta Journal*, having a circulation of 257,676, and the two having a combined Sunday circulation of 489,622. The two newspaper articles reporting this decision are reproduced in the Appendix, page 20. On May 25, 1953, the decision of this Court reversing the Avery case was announced. Seldom has a criminal case in Fulton County attracted so much publicity, led by a front page article in the *Atlanta Constitution*. See Appendix, page 21. Therefore, although the decision of this Court in the Avery case was rendered approximately two months after petitioner's trial, petitioner nevertheless failed to even raise the questions urged here in the amendment to his original motion for new trial, filed on June 29, 1953, over one month after the Avery reversal. As was pointed out in our Brief in Opposition, petitioner's complaint ultimately is that he did not know the law, since had he known the law, he of necessity would have known the facts, in that the only case dealing with this point of law is the Avery case, which involved jury practices in the same county complained of here, to wit, Fulton County, Georgia.

objection to the peremptorily challenging by the State of the one lone Negro juror remaining on the panel. Petitioner felt confident to ignore these questions and take the chances of a jury verdict. That result having been unfavorable to him, he now seeks to assert these defenses through a collateral attack by way of an extraordinary motion for new trial.

By way of information, it should be noted that the Fulton Superior Court has in good faith carried into effect the mandate of this court's opinion in the Avery case, for immediately thereafter, a complete revision of the jury boxes was begun and finally completed and delivered to the Clerk on April 12, 1954. As soon as practicable thereafter, to wit, in early May next following, the new boxes were put into use. Petitioner's case was tried on March 10, 1953, over two months prior to this court's reversal of the Avery case on May 25, 1953.

V.

SUMMARY OF POSITION

This brief will be confined to establishing the following propositions of law:

1. Since the trial court below dismissed (as distinguished from overruling on the merits) petitioner's extraordinary motion for new trial for failure to comply with State procedure, which was affirmed by the Supreme Court of Georgia, there has been no decision by a state court of a federal question, and this court is therefore without jurisdiction to decide the issues sought to be raised by the petition for certiorari, and the writ should be dismissed as improvidently granted.

2. At no stage of the proceeding below, or in this

court, has petitioner asserted a new claim of denial of due process for want of sufficient state corrective process, and therefore, no federal question in this respect is ripe for determination.

The principles of law discussed in the Brief in Opposition will not be re-argued here, and accordingly, the Court is respectfully referred thereto for consideration. By way of summary, it is there maintained that:

(1) Practices of jury commissioners resulting in exclusion of certain classes of jurors from the panel were denominated *propter defectum* in *Lumpkin vs. State*, 152 Ga. 229(7), 109 S.E. 664, and in *Mitchell vs. State*, 69 Ga. App. 771 (4), 26 S.E. 2d 663, it was further held that matters *propter defectum* could not be raised after verdict, even where such matters were unknown to the complainant beforehand, but must be raised by challenge to the array.

(2) Under Georgia practice, an extraordinary motion for new trial does not lie in any case where the complainant either knew or should have known by the exercise of proper diligence, of the facts in time to have incorporated same into the amendment to his original motion for new trial. In footnote 3, supra, it was shown that not only was the Avery case tried and affirmed by the Georgia Supreme Court prior to petitioner's trial, but that the decision of this Court was rendered over one month prior to the filing of petitioner's amended motion. As to the widespread publicity given the Avery case, see the newspaper articles reproduced in the Appendix herein.

(3) Under Georgia practice, extraordinary motions for new trial, not being a part of the direct

review process, are not favored (*Wallace vs. State*, 205 Ga. 751, 55 S.E. 2d 145), and where based on newly discovered evidence, will not be entertained unless a different result would likely have ensued had the facts been known. *Parks vs. State*, 204 Ga. 41, 48 S.E. 2d 837. Applied to the instant case, this would have required petitioner to show either (a) that the white jurors trying him were in fact prejudiced *against* him because of his color, or (b) that had Negroes served on the jury, they would have been prejudiced *for* him because of his color. Petitioner neither alleged nor proved the first proposition and although he in substance alleged the second (R. 9), the short answer thereto is that he is no more entitled to have a jury prejudiced in his favor than he is to have one prejudiced against him.

(4) The affidavits of diligence, accompanying petitioner's motion were defective, and under the opinion of the court below construing the Georgia cases, invalidated the motion. (R. 21-22) While at first impression, this may seem a rather technical objection, when viewed in the perspective of the circumstances regarding the chronological relationship of the various stages of the Avery case and petitioner's case, it is obvious that petitioner's counsel could ill-afford to be too specific in his allegations of diligence, for fear of perjuring himself.

(5) The Avery case, the only authority upon which petitioner relies is readily distinguishable, for there the objections to the jury were properly raised by challenge to the array, filed prior to trial, while here, petitioner not only failed to raise these questions before or during trial, but even

failed to raise them on appeal. See *Wilcoxon vs. Aldredge*, 192 Ga. 634, 15 S.E. 2d 873, cert. den. 317 U.S. 626; *Brown vs. Allen*, 344 U.S. 443, 480, 97 L. Ed. 469, 501, 73 S. Ct. 397, 419, reh. den. 345 U.S. 946.

(6) Petitioner's waiver of his constitutional rights was not affected by action of the state in peremptorily challenging the only Negro juror on the panel not previously disqualified for cause. Numerous authorities from different jurisdictions were cited in support of this principle. Other authorities since brought to our attention are *Morris vs. State*, (1952) 251 S.W. 2d 731(4), cert. den. 345 U.S. 951; *Wasy vs. State*, Ind. Sup. Ct., January 5, 1955 (23 Law Week 2323); 2 Vand. L.R. 111; 48 Col. L.R. 953; 61 Harv. L.R. 1455. With regard to use of the peremptory challenge, it is just as reasonable for the prosecution to conclude that a Negro juror would be prejudiced in favor of an accused of his race as it would be for the petitioner to maintain that the white jurors were prejudiced against him.

(7) Petitioner's contention was in effect that he was entitled as a matter of right to have members of his own race serve on the jury, a contention which has been many times rejected by this Court. *Gibson vs. Mississippi*, 162 U.S. 580; *Akins vs. Texas*, 325 U.S. 398.

VI.

ARGUMENT AND CITATION OF AUTHORITIES

The Writ Should Be Dismissed As Improvidently Granted, The Court Below Having Refused On Procedural Grounds To Pass Upon Petitioner's Constitutional Question.

The judgment of the Fulton Superior Court rendered on the hearing of petitioner's extraordinary motion for new trial, reads as follows:

> "The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not [sic] good as an extraordinary motion and cannot be equally entertained as such.
>
> /s/ E. E. Andrews
>
> Judge S. C. A. C."
>
> (R. 16)

It is obvious from the above language that the court never considered the petitioner's motion on its merits, but instead dismissed it on the ground that the questions sought to be raised therein could not properly be entertained in such a motion. Had the court actually undertaken to determine whether or not petitioner's constitutional questions were meritorious and found against them, the motion would have been *overruled* on the merits, rather than *dismissed* on procedural grounds.

So being, the case is controlled by the decision of this Court in *Hedgebeth vs. North Carolina* (1948), 334 U.S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185. In that case the petitioner sued out a writ of habeas corpus alleging that he had been denied benefit of counsel in violation of due process guaranteed by the Fourteenth Amendment. The Supreme Court of North Carolina dismissed the appeal, assigning as a reason the failure

of petitioner to bring up sufficient portions of the record.

This Court granted certiorari, but after argument, dismissed the writ as having been improvidently granted, the *per curiam* opinion declaring,

> "In reviewing a judgment of a State court, we are bound by the record on which that judgment was based. Since the North Carolina Supreme Court went on the ground that it did not have the full record before it, we are constrained to dismiss this writ because the judgment below can rest on a non-federal ground. Petitioner's rights under the Federal Constitution must be pursued according to the procedural requirements of North Carolina or, in default of relief by available North Carolina proceedings, by a new claim of denial of due process for want of such relief. *Foster vs. Illinois*, 332 U.S. 134, 139, 91 L. Ed. 1955, 1959, 67 S. Ct. 1716."

In any case where it appears that the decision below was not based on a federal ground, the writ will be dismissed as improvidently granted. *Phyle vs. Duffy*, 334 U.S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131, reh. den. 334 U.S. 862; *Missouri Pacific Railroad Co. vs. Hanna*, 266 U.S. 184, 69 L. Ed. 235, 45 S. Ct. 36; *Hammerstein vs. Superior Court*, 341 U.S. 491, 95 L. Ed. 1135, 71 S. Ct. 820, reh. den. 342 U.S. 843; *Bankers Life and Casualty Co. vs. Holland*, 346 U.S. 379, 98 L. Ed. 106, 74 S. Ct. 145 (dissent). The same principle applies to writs of error. *O'Neil vs. Vermont*, 144 U.S. 323, 36 L. Ed. 450, 12 S. Ct. 693; *Tripp vs. Santa Rosa Street Railroad Co. et al*, 144 U.S. 126, 36 L. Ed. 371, 12 S. Ct. 655; *Wood vs. Brady*, 150 U.S. 18, 37 L. Ed. 981, 14 S. Ct. 6; *Herndon vs. Georgia*, 295 U.S. 441, 79 L. Ed.

1530, 55 S. Ct. 794. "Where the highest court of the State delivers no opinion, and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment." *Stembridge vs. Georgia*, 343 U.S. 541, 547, 96 L. Ed. 1130, 1134, 72 S. Ct. 834; *Buck vs. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502; *Dixon vs. Duffy*, 344 U.S. 143, 97 L. Ed. 153, 73 S. Ct. 193.

Neither is the argument of judicial "wasted effort" particularly appealing to this court. In *Layne vs. Western Well Works*, 261 U.S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422, Mr. Chief Justice Taft declared:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

Where the decision is based on State grounds, the mere fact that the State court erred in construing or applying its laws does not confer jurisdiction (*Gibson vs. Mississippi*, 162 U.S. 565, 591, 40 L. Ed. 1075, 1082, 16 S. Ct. 904), as mere error alone does not constitute a denial of due process. *Howard vs. Kentucky*, 200 U.S. 164, 50 L. Ed. 421, 26 S. Ct. 189; *Gryger vs. Burke*, 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256; *Stein vs. New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077.

A decision based on questions of State practice presents no federal question (*Thorington vs. City Council of Montgomery*, 147 U.S. 490, 37 L. Ed. 252, 13 S. Ct. 394), even where the cause of action is based on a federal statute. *Central Vermont Railway Co. vs. White*, 238 U.S. 507, 59 L. Ed. 1433, 35 S. Ct. 865.

More specifically, this Court has many times recognized that constitutional questions may be waived by failure to insist thereon in the trial court. In *Yakus vs. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 859, 64 S. Ct. 660, it was stated,

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil vs. Vermont, 144 U.S. 323, 331, 36 L. Ed. 450, 455, 12 S. Ct. 693; Barbour vs. Georgia, 249 U.S. 454, 460, 63 L. Ed. 704, 707, 39 S. Ct. 316; Whitney vs. California, 274 U.S. 357, 360, 362, 380, 71 L. Ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. vs. Watson, 287 U.S. 86, 77 L. Ed. 180, 53 S. Ct. 32, 86 A.L.R. 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney vs. California, supra (274 U.S. 380, 71 L. Ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey vs. Best, 299 U.S. 1,

81 L. Ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U.S. 371, 25 L. Ed. 717."

See also, *Charleston Federal Savings and Loan Association vs. Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624, reh. den. 324 U.S. 888; *Jennings vs. Illinois*, 342 U.S. 104, 109, 96 L. Ed. 119, 124, 72 S. Ct. 123.

As a corollary of the above rule, is the proposition that oversight of one's chosen counsel does not violate due process. In *Market Street Railway Co. vs. Railroad Commission of California*, 324 U.S. 548, 89 L. Ed. 1171, 65 S. Ct. 770, reh. den. 324 U.S. 890, this court declared,

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal, but it is not grounds for our interference as a denial of constitutional rights."

Or better still, as was said in *United States ex rel Smith vs. Baldi*, 344 U.S. 561, 568, 97 L. Ed. 549, 556, 73 S. Ct. 391,

> "A claim of denial of due process can hardly be predicted upon the failure of a defense move."

Even where a federal question is passed upon by the trial court, but its judgment reversed by the state appellate court on grounds that the question was improperly considered, there is no federal question for consideration by this court (*Louisville and Nashville Railroad Co. vs. Woodford*, 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739), while on the other hand, if the highest state court itself considers the federal question although tardily raised, this court may review such decision. *Shapiro vs. Wilgus*, 287 U.S. 348, 77 L. Ed. 355,

53 S. Ct. 145; *Charleston Federal Savings and Loan Association vs. Alderson*, supra; *Louisville and Nashville Railroad Co. vs. Higdon*, 234 U.S. 592, 58 L. Ed. 1484, 34 S. Ct. 948.

Having thus established that constitutional questions may be waived [4] for failure to raise at the appropriate time and in the appropriate manner, it only remains to determine which law must be looked to in order to determine whether or not such questions were properly raised. To do so, we need hardly travel afar: The decisions of this court admit of no doubt that the manner and time of raising questions under the Constitution of the United States depend upon the requirements of state law. *Layton vs. Missouri*, 187 U.S. 356, 47 L. Ed. 214, 23 S. Ct. 137; *Jacobi vs. Alabama*, 187 U.S. 133, 47 L. Ed. 106, 23 S. Ct. 48; *Baldwin vs. Kansas*, 129 U.S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *Young vs. Ragen*, 337 U.S. 235, 93 L. Ed. 1333, 69 S. Ct. 1072; *Hardware Dealers Insurance Co. vs. Glidden Co.*, 284 U.S. 151, 158, 76 L. Ed. 214, 219, 52 S. Ct. 69; *Grand Rapids and Indiana Railroad Co. vs. Butler*, 159 U.S. 87, 40 L. Ed. 85, 15 S. Ct. 991; *Barbour vs. Georgia*, 249 U.S. 454, 63 L. Ed. 704, 39 S. Ct. 316; *Nevada-California-Oregon Railway Co. vs. Burris*, 244 U.S. 103, 61 L. Ed. 1019, 37 S. Ct. 576.

In *Edleman vs. California*, 344 U.S. 357, 358, 97 L. Ed. 387, 391, 73 S. Ct. 293, this court, in refusing to review the constitutionality of a California vagrancy statute on the ground that petitioner had failed to raise the question during trial but had merely attempted to assert this defense for the first time on appeal, declared,

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[4] In *Ex Parte Spies*, 123 U.S. 131, 181, 31 L. Ed. 80, 91, 8 S. Ct. 21, it was said that the question of raising constitutional questions at the proper time and in the proper mode was not a question of "waiver" but of "claim."

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert vs. Chicago, 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906); Mutual Life Ins. Co. vs. McGrew, 188 U.S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L.R.A. 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

More relevant to the instant case however, is the language found in *Hartford Life Insurance Co. vs. Johnson*, 249 U.S. 490, 492, 63 L. Ed. 722, 724, 39 S. Ct. 336:

"The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here is defined in §237 of the Judicial Code which provides that it shall be competent for this court, by certiorari, to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege, or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution.' It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of

> defeating the claim of Federal right.' Atlantic Coast Line R. Co. vs. Mims, 242 U.S. 532, 535, 61 L. Ed. 476, 478, 37 Sup. Ct. Rep. 188; Gasquet vs. Lapeyre, 242 U.S. 367, 371, 61 L. Ed. 367, 370, 37 Sup. Ct. Rep. 165, and cases cited.
>
> "No suggestion is or could be made, that the Missouri state supreme court's holding in this case was framed to evade the consideration of the Federal right now asserted, for it had long been the established law of that state that, under its system of practice, the construction of either the Federal or state Constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. . . ."

An early application of the principle that constitutional questions are waived if not seasonably raised is found in *State vs. Noel*, (1806) 1 Charlt. 43, 59 (1 Ga. Decisions), where it was held, based on Lord Mansfield's opinion in *Ballard vs. Bennett*, 2 Burr. 775, that the constitutionality of a state statute could not be determined on certiorari or other appellate process; specifically it was held as early as 1857 that objections to a jury panel as a whole were waived unless made prior to trial by challenge to the array (*Jordan vs. State*, 22 Ga. 545); and finally, added to this are the many Georgia decisions subsequent to the ratification of the Fourteenth Amendment stating the practically unanimous view that constitutional rights must be diligently asserted. Moreover, as recent as 1952, this court had occasion to recognize and apply the stringent require-

ments of Georgia law as to raising constitutional questions, as stated in *Persons vs. Lea*, 207 Ga. 384, 61 S.E. 2d 832. See *Stembridge vs. Georgia*, 343 U.S. 541, 96 L. Ed. 1130, 72 S. Ct. 834.

It is therefore an unusual argument to make, and a late day to make it, that the petitioner, by virtue of the Fourteenth Amendment and his color, is exempted from all procedural requirements of state law. Petitioner has had his day in court with ample opportunity to raise directly the questions he now pursues collaterally, and that decision was affirmed by the highest court of the state, from which no further review was sought. Of necessity, there must be a time when all litigation ceases; such is the impact, implicit, if not expressed, by that recent *cause celebre*, *Rosenberg vs. United States*, 346 U.S. 273, 97 L. Ed. 1607, 73 S. Ct. 1152. The idea receives its classical expression in *Whitney vs. California*, 274 U.S. 357, 362, 71 L. Ed. 1095, 1100, 47 S. Ct. 641:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey vs. DesMoines, 173 U.S. 199, 43 L. Ed. 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. vs. Illinois, 175 U.S. 634, 44 L. Ed. 302, 20 Sup. Ct. Rep. 205."

VII.

CONCLUSION

The decision of the Supreme Court of Georgia below having rested on the non-federal ground that state procedural requirements had not been complied with, this court is without jurisdiction and the writ should be dismissed. 28 U.S.C., Section 1257(3); *Loftus vs. Illinois*, 334 U.S. 804, 92 L. Ed. 1737, 68 S. Ct. 1212. No

independent due process attack having been made below against these procedural requirements on the ground of denial of sufficient corrective process, the question is not open for consideration here. *Foster vs. Illinois*, 332 U.S. 134, 139, 91 L. Ed. 1955, 1959, 67 S. Ct. 1716; *Hedgebeth vs. North Carolina*, supra.

Respectfully submitted,

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VIII.

APPENDIX

NEWSPAPER REPORTS OF *AVERY VS. STATE*, 209 Ga. 116, 70 S.E. 2d 716, and *Avery vs. Georgia*, 345 U.S. 599, 97 L. Ed. 1244, 73 S. Ct. 891

A.

Avery vs. State

1. *Atlanta Constitution*, Tuesday, April 15, 1952, p. 15.

SUPREME COURT PLEA REJECTED ON TWO-COLORED JURY SLIPS

By a 5-2 vote, the Georgia Supreme Court has ruled that the use of different colored slips for whites and Negroes in drawing prospective jurors in Fulton County is not enough to set aside the death sentence of a Negro convicted of rape.

James Avery, Walker County Negro, was tried in Fulton County on a change of venue. The jury found him guilty.

Avery's attorneys said Negroes were discriminated against in both the drawing of the trial and grand juries because their names were written on different colored slips and could be easily recognized at jury drawings.

The majority decision, written by Justice T. S. Candler, said the evidence was sufficient to support the verdict in the lower court.

Justice Lee B. Wyatt, who wrote the minority opinion, said "the practice is conclusive evidence of discrimination and for that reason, the case should be reversed."

The court was critical of the use of different colored slips, however. Justice T. Grady Head recommended it be discontinued as soon as possible.

2. *Atlanta Journal*, Tuesday, April 15, 1952, 5 Star Final, page 10.

DOOMED MAN LOSES PLEA ON JURY LIST

The State Supreme Court Monday upheld the conviction and death sentence of a Negro charged with rape. The defendant had appealed to the high court on the ground that the prepar-

ation of Fulton County jury lists discriminated against Negroes.

The doomed man is James Avery, who was charged with rape in Walker County in 1950 and tried in Fulton in 1951 on a change of venue.

Attorneys for Avery contended that Negroes are discriminated against in Fulton because a disproportionate number of Negroes are placed on the jury lists, and because the names of Negroes are placed in the jury box on yellow cards while the names of white jurors are on white cards.

Discrimination Denied

The Supreme Court held, however, that the evidence showed there was no discrimination in the drawing of the jury that tried Avery.

In the five-to-two majority opinion, written by Justice Thomas S. Candler, the court also noted that "jury service is not a right nor a privilege but a burden that the state summons certain of its citizens to bear, and upon no basis is appointment of jury duty required by the Constitution, the law or any decision which we have been able to find."

The court ruled there was no evidence to show the jury commissioners had "arbitrarily and systematically excluded upright and intelligent colored men because of race and color as contended."

In the particular case involved, the court held the placing of the names of jurors on different colored cards did no harm to the defendant.

Head Takes Exception

Justice T. Grady Head, in a special concurring opinion, however, said there is "neither constitutional nor statutory authority for the use of different colored paper in placing the names of colored jurors in the jury box," and added such a procedure "could serve only one purpose, to wit, discrimination . . ."

Justice Head declared "such practice is wrong and should be discontinued at the first opportunity to revise the jury lists."

Justices Atkinson and Wyatt dissented from the majority opinion and Justice Wyatt wrote there was "conclusive evidence of discrimination and for this reason the conviction should be reversed."

B.

Avery vs. Georgia

1. *Atlanta Constitution*, Tuesday Morning, May 26, 1953, Front Page Article.

COURT NULLS ALL-WHITE JURY VERDICT

WASHINGTON, May 25—(AP)—The Supreme Court set aside today the rape conviction against a Georgia Negro, holding there was evidence of discrimination against Negroes in the selection of the trial jury.

The Negro, James Avery, was convicted in Fulton County in September, 1951, and sentenced to death in the electric chair on conviction of the rape of a white woman.

His attorneys, in appealing to the Supreme Court, protested that jury commissioners of Fulton County printed names of prospective white jurors on white slips of paper and names of Negro jurors on yellow slips.

Chief Justice Vinson, who wrote the court's opinion, said there was not a single Negro on the panel of 60 from which the Avery jury was selected.

"Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process," the chief justice wrote. "And, in view of the case before us, where not a single Negro was selected to serve on a panel of 60—though many were available—we think that petitioner has certainly established a prima-facie case of discrimination."

Commented Justice Frankfurter, who wrote a separate concurring opinion:

"The stark resulting phenomenon here was that somehow or other, despite the fact that over 5 per cent of the slips were yellow, no Negro got on the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity."

2. *Atlanta Constitution*, Tuesday Morning, May 26, 1953, p. 6.

WEBB DOUBTS AVERY RULING MEANS UPSET

Fulton County Sol. Gen. Paul Webb said Monday he did not believe the Supreme Court's Avery case decision would result in a "serious upset to our system."

Other court observers, however, speculated that the effect of the ruling in the Avery case holding that discrimination had been practiced against the Negro may be that Fulton County indictments on which trial is pending could be attacked on the ground that grand juries also are drawn from different colored cards.

One court official said the Supreme Court's action would probably result in a meeting of judges and jury commissioners to discuss future policy.

The same spokesman pointed out that old cases in which convictions were obtained under the two-color jury selection system could not be reopened because objections must have been made at the time of the trial.

3. *Atlanta Journal*, Tuesday Evening, May 26, 1953, Final Home Edition, p. 11.

FULTON SEEN MOVING TO BAN DIFFERENT COLORED JURY SLIPS

Court Ruling Against Practice Draws Prediction of Action

The Fulton Jury Commission is expected to meet in the near future to abolish use of different colored jury-box slips for Negroes and whites.

Action by the jury commission was predicted Tuesday following a Monday ruling by the U.S. Supreme Court against the practice of listing white jurors on white slips and Negro jurors on yellow slips.

Court officials, however, said they see no profound change in the present method for selecting juries, since Negroes already serve on juries in Fulton County.

Thomas D. Body Sr., retiring chairman of the current jury commission, said Tuesday that the group has retired until September and that he has not discussed the matter with other members of the commission.

Judges of the Fulton Superior Court are expected, however, to ask the jury commission to reconvene after the judges have had ample opportunity to study the high tribunal's ruling.

The Supreme Court ruled on the jury slips in setting aside the conviction of James Avery, 22-year-old Negro truck driver who was sentenced to death in September, 1951, for the 1950 assault of a white woman near Chickamauga.

Judge E. E. Andrews, presiding judge, reserved comment on the ruling until he has had an opportunity to study the decision. He stated, however, that if the Supreme Court directs it, the custom will be changed.

Fulton Solicitor Paul Webb predicted little more change than the clerical work involved.

At present the jury list is taken from the tax digest by the commission. Negro jurors—who are listed on yellow paper in the tax office—are also listed on yellow jury slips while white people are listed on white slips.

All slips are kept in a master box where they are not arranged according to alphabet or race, but are "mixed up," court officials explained.

The slips are drawn from the master box in open court by judges hearing cases in either the superior, civil or criminal divisions. When drawn, the slips are handed from the judge to a deputy sheriff who in turn passes them to the court clerk.

The change to all-white slips will have no effect on cases already adjudicated but will effect cases now in progress where the point of different colored jury slips has been raised.